

UNREPORTED/NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 00-2451

UNITED STATES OF AMERICA

v.

RONALD GROSS,
Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF THE VIRGIN ISLANDS

D.C. Crim. No. 98-cr-00172-1

District Judge: Honorable Thomas K. Moore

Argued: May 14, 2001

Before: McKEE, RENDELL, BARRY, Circuit Judges

(Opinion Filed: June 27, 2001)

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MEMORANDUM OPINION OF THE COURT

BARRY, Circuit Judge

_____ On August 7, 1998, Ronald Gross was charged with twelve counts of mail fraud, in violation of 18 U.S.C. § 1341, for mailings¹ that occurred between August 14, 1993 and November 12, 1993 in conjunction with his insurance agency business. On February 22, 2000, the day that a bench trial on the twelve-count indictment was to begin, Gross entered a guilty plea on four counts. Gross now appeals the 27-month term of imprisonment the District Court imposed on July 26, 2000, claiming that the Court

¹Gross's mailings were a part of a scheme to defraud in which he, as a licensed insurance broker and agent, took monies that had been paid to him by his clients for insurance premiums and diverted those monies for personal use. Gross concealed his actions for some time by periodically utilizing "new" premium monies that he received to pay off the outstanding debts related to "old" premium monies. In essence, Gross repeatedly utilized the then-current month's incoming premium payments to pay off obligations associated with the previous month's past-due premium monies.

Gross's scheme eventually collapsed when, by late 1993, the total amount that he had diverted became too great and the amount of incoming premiums was not large enough to cover the outstanding premiums from past months. At this point of collapse, the amount of money outstanding (and owed to the insurance companies as premiums paid by insureds to Gross) was \$277,054.96.

incorrectly determined the “actual loss” associated with his offense. Additionally, Gross claims that the District Court erred in determining that his conduct merited a two-level increase for abuse of a position of trust pursuant to U.S.S.G. § 3B1.3. We have jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C § 3742(a). After a careful review of the record, we will affirm.

I.

A. Loss Calculation

Gross first contends that the District Court incorrectly determined the actual loss caused by his premium kiting scheme. More precisely, Gross claims that he was entitled to a credit against the actual loss figure on account of the fact that he sold his agency in return for the buyer’s promise to assume and repay Gross’s obligations with respect to the outstanding premiums owed to the insurance companies. Because the evidence clearly showed that Gross’s repayment of his obligations (via the sale of his agency) did not occur until well after his offense had been detected such that both civil and criminal authorities had been notified, we find that the District Court appropriately denied him the credit he sought against the actual loss attributable to his offense.

The gist of Gross’s loss calculation argument is that he made preliminary arrangements for the payment of the outstanding premiums prior to the date that his offense was detected and, furthermore, that he effected actual payment of those premiums (via the sale of his agency to another) before he had “any knowledge that he was the focus, subject or target of any criminal investigation.” See Appellant’s Brief at 16. Gross

fully acknowledges that this Court has established the “date of detection” as the cut-off point after which a criminal defendant may no longer make restitution with the expectation that such restitution might count as an offset against the total actual loss figure calculated in U.S.S.G. § 2F1.1 for sentencing purposes. See United States v. Shaffer, 35 F.3d 110, 115 (3d Cir. 1994) (“[A]ctual loss should be calculated as it exists at the *time of detection* rather than at the time of sentencing.”) (emphasis added); United States v. Mummert, 34 F.3d 201, 204 (3d Cir. 1994) (“A defendant in a fraud case should not be able to reduce the amount of loss for sentencing purposes by offering to make restitution after being caught.”). The different issue of restitution aside, Gross suggests that the all-important “date of detection” must be defined *subjectively* such that a crime is not “detected” (for purposes of an actual loss calculation under § 2F1.1) until the defendant himself has received some notice that his offense has been discovered or, at least, that his actions are being investigated by the authorities. See Appellant’s Brief at 17.

We reject Gross’s *subjective* construction of the “date of detection” and, therefore, his challenge to the District Court’s loss calculation. Gross offers no real reasoning behind nor any authority for his unique position that the date of detection should be determined with reference to a defendant’s subjective awareness that “the gig is up.” Furthermore, in those cases in which defendants have been denied offsets against total loss figures when their attempts at restitution followed the date of the crime’s detection, “detection” was based on the respective discoveries of the crimes by the victims – all

banks. See e.g., Shaffer, 35 F.3d at 115; Mummert, 34 F.3d at 204; United States v. Flowers, 55 F.3d 218 (6th Cir. 1995); United States v. Mau, 45 F.3d 212, 216 (7th Cir. 1995); United States v. Fydenlund, 990 F.2d 822, 826 (5th Cir. 1993). Finally, the concept of a “date of detection” is only pertinent in that it serves as the cut-off point for a defendant to make restitution that could offset actual loss. Because the calculation of the actual loss before any offsets is, unlike intended loss, a purely *objective* exercise that requires no peering into the mind of the defendant, then for the sake of consistency the assessment of any potential offsets to that actual loss figure should also be an objective exercise that is unrelated to the thoughts, knowledge, or intentions of the defendant.²

Having dismissed Gross’s *subjective* “date of detection” argument, the question remains whether the *objective* facts show that his crime had, indeed, been detected prior to his payment of the outstanding premiums; if so, then the District Court appropriately sentenced him in accord with the \$277,054.96 of actual loss.³ In this regard, we find that

²Significantly, even if we were to accept Gross’s *subjective* version of the “date of detection,” the facts do not support his contention that he lacked the knowledge that his crime had been detected when he effected payment of the outstanding premiums. See generally Appellee’s Brief at 34-36. Gross (1) had received notice on November 5, 1993, from a victim insurance company that his actions would be brought to the attention of the Insurance Commissioner if certain insurance premiums were not paid by November 16, 1993 and (2) knew the FBI was looking for him by January of 1994. (A110).

³We also note that the fact that Gross’s *intended* loss may have been less than the *actual* loss – because of his supposed designs at eventual repayment – is of no import under the Sentencing Guidelines. See U.S.S.G. § 2F1.1, Application Note 8 (“[I]f an intended loss that the defendant was attempting to inflict can be determined, this figure will be used if it is *greater* than the actual loss.”) (emphasis added); see also Shaffer, 35 F.3d at 113 (acknowledging that a defendant could be sentenced on actual loss

the record abounds with *objective* evidence that Gross's crime was detected well before May of 1994, when Gross admittedly consummated his agreement to sell his agency and effected the payment of outstanding premiums to the insurance companies. This objective proof of detection includes: (1) on December 23, 1993, the transmission of cancellation notices from an insurer, Red Hook Agencies, to insureds who had paid premiums to Gross for insurance with Red Hook; (2) on December 23, 1993, the filing of a complaint (regarding Gross's actions) with the insurance regulatory agency, the Division of Banking and Insurance; and, most importantly, (3) on January 3, 1994, the commencement of an FBI investigation of Gross's activities. (A173, 185).

It is, therefore, clear that Gross's efforts to effect payment of his outstanding obligations to the insurance companies occurred well after his actions had been detected. Accordingly, we will affirm the District Court's finding that Gross did not deserve any offset against the total loss figure for the sale of his agency in consideration for the buyer's promise to assume and repay all obligations that were outstanding.

B. Abuse of Position of Trust

Gross also contends that the District Court erred in determining that his conduct merited a two-level increase for abuse of a position of trust pursuant to U.S.S.G. § 3B1.3. Again, we disagree.

In order for a two-level enhancement for abuse of a position of trust to be applied,

attributable to his offense, even though the District Court had made a finding that there was no intended loss whatsoever).

a defendant must be found (1) to have occupied a position of trust and (2) to have abused that position in a manner that either significantly facilitated the commission of the crime or concealment thereof. See United States v. Sokolow, 91 F.3d 396, 412 (3d Cir. 1996); see generally U.S.S.G. § 3B1.3, Application Note 1. In Gross’s case, Virgin Islands law⁴ imposed a statutory duty such that any funds received by one in Gross’s position (as an agent, solicitor, or broker) were deemed to have been received in a fiduciary capacity. Gross certainly occupied a position of trust vis-a-vis the victim insurers. Furthermore, Gross’s efforts to conceal his personal use of premium money was significantly aided by the intermediary, fiduciary position he occupied vis-a-vis the insurers (and their insureds) in that the position provided him with exclusive access and control over a steady influx of additional premium monies ideal for covering past-due premium obligations. Accordingly, we find that the District Court properly determined that Gross merited a two-level increase for abuse of a position of trust.

II.

For the reasons stated above, we will affirm the judgment of the District Court.

TO THE CLERK OF THE COURT:

Kindly file the foregoing Memorandum Opinion.

⁴22 V.I.C. § 785(b) provides that “[a]ll funds representing premiums, less commissions, or return premiums received by an agent, solicitor, or broker, shall be so received in his *fiduciary capacity*, unless there is a separate agreement between him and the insurer.” See 22 V.I.C. § 785(b) (emphasis added).

/s/ Maryanne Trump Barry
Circuit Judge

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JUDGMENT

This cause came to be heard on the record from the United States District Court for the District of the Virgin Islands and was argued on May 14, 2001,

After consideration of all contentions raised by the appellant, it is

ADJUDGED and ORDERED that the judgment of the District Court be and is hereby affirmed.

ATTEST:

Marcia M. Waldron, Clerk

Dated: 27 June 2001